REMARKS

I. General

Claims 1-29 are pending in this Application. The issues raised in the Current Action are as follows:

- Claims 1-10 and 23-24 are rejected on the ground of nonstatutory obviousness-type double patenting as being patentable over claims 1-21 of U.S. Patent No. 6,751,444 to Meiyappan (hereinafter "*Meiyappan*").
- Claims 1, 4-7, 11-14, and 17-28 are rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,611,506 to Huang et al. (hereinafter "*Huang*").
- Claims 2-3, 8-10, and 15-16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Huang* in view of U.S. Patent No. 4,794,635 to Hess (hereinafter "*Hess*").

Claims 20-21 and 23 have been amended. Note that the claims have been amended only for the purpose of correcting minor informalities and not in the face of prior art. As such, no new matter has been added.

II. Double Patenting Rejection

Claims 1-10 and 23-24 are rejected under obviousness-type double patenting grounds in view of *Meiyappan*. *See* Current Action, pg. 2. Applicant proposes filing a Terminal Disclaimer upon an indication that the pending claims are allowable if the double patenting rejection still stands, thereby obviating such a double patenting rejection.

III. Rejection under 35 U.S.C. § 102

A. Rejection Under 35 U.S.C. § 102(e)

It is well settled that to anticipate a claim, the reference must teach every limitation of the claim. *See* M.P.E.P. § 2131. Moreover, in order for a prior art reference to be anticipatory under 35 U.S.C. § 102 with respect to a claim, "[t]he limitations must be

arranged as required by the claim." *See* M.P.E.P. § 2131; citing *In re Bond*, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990). Furthermore, in order for a prior art reference to be anticipatory under 35 U.S.C. § 102, "[t]he identical invention must be shown in as complete detail as is contained in the . . . claim." *see* M.P.E.P. § 2131; *citing Richardson v. Suzuki Motor Co.*, 9 U.S.P.Q.2d 1913 (Fed. Cir. 1989).

Claims 1, 4-7, 11-14, and 17-28 are rejected under 35 U.S.C. § 102(e) as being anticipated by *Huang*.

1. Independent Claim 1

Claim 1 discloses a process for allocating carriers in a multi-carrier system comprising determining a location of a subscriber with respect to a base station. The Examiner appears to point to *Huang*'s Figures 1 and 2, col. 4 lines 52-53, and col. 6 lines 10-15, as satisfying this limitation. *See* Current Action, pg. 5. In *Huang*, there is no determining a subscriber's location with respect to a base station. Instead, *Huang* allocates a carrier based on how much load there is on that carrier and not based on the distance between a subscriber and base station. Thus, *Huang* is only concerned with the load level on its carriers and not the location of the subscriber with respect to the base station. Although *Huang* mentions a border carrier that serves a subscriber station located at an outer periphery of a coverage area, this is merely a description of the border carrier's function and not a location requirement in order for the subscriber to be assigned to the border carrier. In fact, when *Huang*'s system determines that a transferee-candidate carrier is as a border carrier, the system adjusts the threshold load level to favor selecting the border carrier without considering the subscriber's location because, according to *Huang*, the border carrier tends to have better radio frequency coverage and performance. *See Huang*, col. 7 lines 48-50, and col. 9 lines 10-20. Accordingly, *Huang* does not disclose determining a location of a subscriber with respect to a base station, as recited by claim 1. Therefore, *Huang* fails to teach all limitations of claim 1.

Further, *Huang* fails to disclose selecting carriers from a band of multi-carriers to allocate to the subscriber according to the location of the subscriber with respect to the base station. The Examiner again points to *Huang*'s Figures 1 and 2, col. 4 lines 52-53, and col. 6 lines 10-15, as satisfying this limitation. *See* Current Action, pg. 5. Further, the Examiner appears to assert that *Huang*'s multi-carrier selector **18** discloses this limitation. *See* Current

Action, pg. 5. Applicant respectfully disagrees. As discussed above, *Huang* is concerned with allocating traffic between multiple carriers based upon the measured load for each carrier. *See Huang*, Abstract, col. 2, lines 40-43. Indeed, *Huang*'s multi-carrier selector **18** is described as only selecting a carrier for a subscriber requesting access based on a comparison between the load level of a first carrier and the load level of a second carrier. *See Huang*, col. 4, lines 52-55; and col. 6, lines 10-15, Abstract. Further, one of ordinary skill in the art would know load is independent of distance, *e.g.*, a high load does not correlate to a close subscriber just as a low load does not correlate to a far away subscriber, or vice versa. Accordingly, neither the cited portion nor the complete text of *Huang* discloses the claim 1 recitation of selecting carriers "according to the location of the subscriber with respect to the base station." Therefore, *Huang* fails to teach all limitations of claim 1.

Also, *Huang* fails to disclose indicating to the subscriber whether or not to adjust transmit power to above its normal transmit power range. The Examiner asserts that *Huang*'s load measurer **14** discloses this limitation. *See* Current Action, pg. 5. Applicant respectfully disagrees. *Huang*'s load measurer, as its name indicates, simply measures the load of each carrier, *i.e.*, current downlink or uplink power of simultaneous base station transmissions based upon the active traffic channels of each carrier. *See Huang*, col. 4, lines 4-8, and 13-19. There is no indication in *Huang* that the load measurer is even capable of communicating with the subscriber, let alone indicating to the subscriber whether or not to adjust transmit power to above its normal transmit power range, as required by claim 1. Moreover, *Huang* is not at all concerned with the transmit power of the subscriber because its main goal is to determine, at the base station, which of the carriers is appropriate to assign to a subscriber based on the carriers' measured load. Accordingly, *Huang* fails to teach all limitations of claim 1. Therefore, Applicant requests withdrawal of the rejection of record.

2. Independent Claim 11

Claim 11 discloses an apparatus comprising a carrier allocator to determine spectral priority based on information gathered from access requests sent by subscriber units. The Examiner cites portions of *Huang* that disclose only the allocation of a carrier. *See* Current Action, pg. 6; *Huang*, col. 10, lines 59-61. At the Examiner's citations, there is no mention in *Huang* of spectral priority based on information gathered from access requests sent by

subscriber units (*e.g.,* time delay or path loss, *see* Current Specification, paragraphs [0073]-[0078]), let alone a carrier allocator can determine such priority. Instead, *Huang*'s system receives a subscriber's request, measures the load level of the call-originating carrier and transferee-candidate carrier, and determines whether the subscriber remains on the call-originating carrier or is subject to a hand-off. *See Huang*, Figures 2, 3, 6, 7A, and 7B. This process occurs in the order that a request is received without consideration to whether a subscriber has priority over other subscribers in being assigned to a carrier in the coverage area, *i.e.*, the spectrum. *See Huang*, col. 3 lines 57-65. Accordingly, *Huang* does not disclose a carrier allocator that determines spectral priority based on information gathered from access requests sent by subscriber units. Therefore, *Huang* fails to teach at least this limitation of claim 11.

Further, *Huang* fails to disclose a power control unit coupled to the carrier allocator to indicate a power control range for each of the subscriber units. The Examiner appears to assert that *Huang*'s load measurer **14** discloses this limitation. *See* Current Action, pg. 6. Applicant respectfully disagrees. As discussed above, *Huang*'s load measurer, as its name indicates, simply measures the load of each carrier, *i.e.*, current downlink or uplink power of simultaneous base station transmissions based upon the active traffic channels of each carrier. *See Huang*, col. 4, lines 4-8, and 13-19. Even though *Huang*'s load measurer may be capable of measuring power from overhead channels and traffic channels, *Huang*'s load measurer is simply not a power control unit coupled to the carrier allocator to indicate a power control range for each of the subscriber units as set forth in the claim. Instead, *Huang* is mainly concerned with the base station measuring the carriers' load level and not with the subscribers, let alone indicating a power control range for each of the subscriber units. Accordingly, *Huang* fails to teach all limitations of claim 11. Therefore, Applicant requests withdrawal of the rejection of record.

3. Independent Claim 18

Claim 18 discloses a method comprising the subscriber receiving an indication of carriers selected based on distance of the subscriber from the base station in relation to other subscribers, the carriers for use in communicating with a base station. The Examiner asserts that the selection of an appropriate carrier described by *Huang* satisfy this limitation. *See*

Current Action, pg. 6. Applicant respectfully disagrees and reiterates that *Huang*'s selection of a carrier is based on whether the load level of a first carrier is greater than a second carrier (*see Huang*, Figure 2 (S18, S22, and S24), col. 6, lines 6-18). In fact, there is no mention in *Huang*, at the Examiner's citations, regarding the subscriber's location with respect to the base station or in relation to other subscribers. Accordingly, *Huang* does not disclose the subscriber receiving an indication of carriers selected based on distance of the subscriber from the base station in relation to other subscribers, the carriers for use in communicating with a base station, as recited by claim 18. Therefore, *Huang* fails to teach all limitations of claim 18.

4. Independent Claim 22

Claim 22 discloses a method for communicating between a base station and subscribers comprising comparing interference to adjacent channel leakage power with output power of a subscriber. Although *Huang*'s abstract states that "[t]he carrier assignment of the subscriber depends upon a predetermined threshold, which preferably considers actual or estimated differential interference between the first carrier and the supplemental carrier," *Huang* does not disclose this claim's step of comparing interference to adjacent channel leakage power with output power of a subscriber. The cited portions of *Huang* do not discuss or mention adjacent channel leakage power or output power of a subscriber, let alone comparing the interference to the adjacent channel leakage power caused by the output power of a subscriber. Instead, *Huang* discloses determining the predetermined threshold, which is used to decide whether a hand-off occurs, based upon comparing the interference level of a first carrier (*e.g.*, "per carrier," *see Huang*, col. 8 lines 23-28) as compared to the interference level of a second carrier. *See Huang*, col. 8, lines 29-37. Accordingly, *Huang* does not disclose comparing interference to adjacent channel leakage power with output power of a subscriber. Therefore, *Huang* fails to disclose at least this limitation of claim 22 and thus, fails to teach all limitations of claim 22.

Further, *Huang* fails to disclose selectively allocating one or more carriers of a band to a subscribers in a multi-carrier system based on results of comparing the adjacent channel leakage power to the output power, wherein one or more subscribers closer to a base station are allocated carriers closer to the band edges of the operating channel and one or more

subscribers further from the base station are allocated carriers near or at the center of the operating channel. The Examiner appears to assert that *Huang* discloses this limitation by describing a carrier allocation procedure based on the load levels (*e.g.*, interference within the carrier) of the call-originating carrier and the transferee-candidate carrier, which is measured by the base station subsystem, wherein the call-originating and transferee-candidate carriers serve different geographic regions with at least one overlap in which the subscriber is located. *See* Current Action, pg. 6; *Huang*, Abstract, col. 1, lines 55-60, col. 5, lines 57-67, and col. 6 lines 6-18. As discussed above, *Huang* allocates carriers based on the difference between the measured load levels of a first carrier and a transferee-candidate carrier and not on the results of comparing the adjacent channel leakage power to the output power of a subscriber, as recited by claim 22. Moreover, *Huang* is not concerned with whether a carrier is near or at the center of the operating channel or closer to the band edges. Instead, *Huang* is concerned with determining whether the call originating carrier can handle the subscriber or an inter-carrier is necessary to hand-off the subscriber to the transferee-candidate, regardless of where in the operating channel the carrier is at. Thus, *Huang* fails to disclose this limitation. Accordingly, *Huang* fails to teach all limitations of claim 22. Therefore, Applicant requests withdrawal of the rejection of record.

5. Dependent Claims 4-7, 12-14, 17, 19-21, and 23-28

Each of dependent claims 4-7, 12-14, 17, 19-21, and 23-28 inherits the limitations of the claims from which they depend. As shown above, *Huang* does not satisfy every limitation of the independent claims. Accordingly, the dependent claims are allowable at least for the reasons set forth above with respect to the independent claims. Moreover, dependent claims 4-7, 12-14, 17, 19-21, and 23-28 set forth limitations making them patentable in their own right.

For example, dependent claim 4 recites calculating a time delay and a path loss associated with the subscriber. The Examiner cites col. 1, lines 55-67 of Huang as satisfying this limitation. *See* Current Action, pg. 7. However, this cited portion does not discuss or mention any calculating of a subscriber's time delay or path loss. Instead, the cited portion in *Huang* discusses a problem with existing technology in that the base station may enter a "time out" period while it waits for a response or transmission from the subscriber because

the subscriber's transmit power level may be too weak to compensate for higher interferences. *Huang*, col. 1, lines 55-67. Accordingly, *Huang* fails to disclose calculating a time delay and a path loss associated with the subscriber, as recited by claim 4. Therefore, Applicant requests withdrawal of the rejection of record.

Moreover, claim 4 recites "determining transmit power requirements for the subscriber based on the time delay and the path loss." The Examiner relies on the same portion of *Huang* (col. 1, lines 55-67) as satisfying this limitation. *See* Current Action, pg. 7. As discussed above, *Huang* describes a problem with existing technology that may cause a base station to enter a "time out" period, waiting for a response or transmission from the subscriber. A base station being in "time out" due to lack of subscriber activity is not the same as determining transmit power requirements for the subscriber based on the calculated time and delay and path loss of the subscriber. Accordingly, *Huang* fails to disclose at least this limitation of claim 4. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 6 recites "sending a command to the subscriber to use either a normal or extended power control range based on carrier allocation." The Examiner relies on *Huang*'s Figure 2, col. 5 lines 57-67, col. 6 lines 6-17, as satisfying this limitation. As discussed above, *Huang* is not concerned with the subscriber, except that it gets assigned to a carrier. There is no discussion at all in *Huang* of the subscriber using a normal or extended power control range, letting alone commanding it to do so based on carrier allocation. As shown, *Huang* fails to disclose this claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 7 recites "adjusting a power control setting for the subscriber at the base station." At the Examiner's citation, *Huang* states the "base station subsystem **24** adjusts the predetermined threshold prior to selecting the transferee-candidate carrier." *See* Current Action, pg. 7, *Huang*, col. 7, lines 64-67. Despite the same use of the word "adjust," the base station of *Huang* is changing the predetermined threshold of differential interference programmed at the base station, which is a different action than "adjusting a power control setting for the subscriber," as recited by claim 7. *Huang*, col. 4, lines 57-67, col. 7, lines 64-67, and col. 8, lines 24-28. Accordingly, *Huang* fails to disclose adjusting a power control

setting for the subscriber at the base station. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 12 recites "the carrier allocator allocates carriers at edges of a band to the nearest subscribers," and claim 13 recites "the carrier allocator classifies subscribers into priority groups and allocates carriers to each of the subscribers based on the priority group in which each of the subscribers resides." The Examiner points to the discussion in *Huang* that merely mentions the potential allocation of the transferee-candidate carrier as satisfying both claims' limitations. *See* Current Action, pg. 7. Applicant respectfully disagrees. *Huang*'s allocation of a carrier occurs, regardless of where in the band the transferee carrier may be operating and of the location of the subscriber, as long as the steps of Figures 7A and 7B are satisfied. In other words, either the call originating carrier or the second carrier (transferee-candidate) is selected, depending on the measured load levels of both carriers. *See Huang*, Figures 2, 3, 7A, and 7B. Similarly, there is no classification of subscribers into priority groups, let alone allocation based on such priority groups. Thus, *Huang* fails to disclose these limitations. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 17 recites "the power control units command at least one of the subscriber units to extend the power control range of the subscriber," and claim 19 recites "driving up or down subscriber transmit power depending on a location of the subscriber in relation to a base station." The Examiner asserts that *Huang*'s load measurer **14** discloses these limitations of claims 17 and 19. *See* Current Action, pg. 8. Applicant respectfully disagrees. As discussed above, nothing in *Huang* indicates or suggests that the load measurer is capable of communicating with the subscriber, let alone commanding it to adjust its power control range or having the transmit power driven up or down depending on the subscriber's location, as required by claims 17 and 19, respectively. Consequently, *Huang* fails to disclose these limitations. Therefore, Applicant requests withdrawal of the rejection of record.

Rejection under 35 U.S.C. § 103(a)

In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a *prima facie* case of obviousness. *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The Examiner cannot satisfy this burden through "mere conclusory statements; instead, there must be some articulated reasoning with some rational

underpinning to support the legal conclusion of obviousness." *KSR Int'l. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ 2d 1385, 1396 (2007) (citing *In re Kahn*, 441 F.3d 977, 988, 78 U.S.P.Q.2d 1329, 1336 (Fed. Cir. 2006)). In *KSR*, the United States Supreme Court affirmed the factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), which must be considered in applying the statutory test: (1) determining of the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims at issue; (3) resolving the level of ordinary skill in the pertinent art, and (4) evaluate evidence of secondary considerations. Therefore, the rejection must address all the limitations of the claims. Moreover, the Examiner must provide analysis supporting any rationale why a person skilled in the art would combine the prior art to arrive at the claimed invention, and "[such] analysis should be made explicit," *KSR*, 127 S.Ct. at 1741. The Examiner has failed to at least show that the pending claims are obvious under the framework set out in *Graham*. That is, the Examiner has failed to address all the limitations of the claims and provide explicit analysis supporting any rationale that a person skilled in the art would combine the cited prior art. Therefore, Applicant requests that such rejections be withdrawn.

Lack of Rationale

Moreover, Applicant notes that the Supreme Court further stated that "As is clear from cases such as *Adams*, a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." *Id.* Thus, it is "important [for an examiner] to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements" in the manner claimed. *Id.* Indeed, the Supreme Court indicated that there should be an "explicit" analysis regarding "whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue." *Id.*

The Office Action admits that *Huang* does not teach having various limitations of claims 2-3, 8-10, and 15-16. *See* Current Action, pgs. 10-12. The Examiner attempts to cure this deficiency by introducing *Hess*, which the Examiner alleges to teach having such limitations. *Id.* However, the Examiner does not provide any rational analysis as to the rationale supporting the rejection. For example, in the rejection of claim 2, the Examiner states that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Huang by specifically selecting carriers based

on the proximity of subscribers to the base station." Here, the Examiner fails to provide a reason that it "would have been obvious," but instead simply alleges in a conclusory statement without any supporting analysis that details any articulated reasoning that it would have been obvious to modify *Huang* as taught by *Hess*. As such, pursuant to *KSR*, the Examiner has not satisfied the burden of establishing a *prima facie* case of obviousness. *KSR*, 127 S. Ct. at 1741. Therefore, Applicant requests withdrawal of the rejection of record.

Further, Applicant respectfully points out that the Examiner's proposed combination is inappropriate insomuch as it would change the principle operation of *Huang*. "If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious." *In re Ratti*, 270 F.2d 810 (C.C.P.A. 1959). If *Huang* and *Hess* were to be combined, *Huang* would be required to be modified to include *Hess*' received signal strength indicator **18**b. Moreover, it would be uncertain whether this new criteria of "received signal strength" for channel or carrier allocation would be incorporated prior to, after, or in lieu of the measurement of the load levels of the first and second carriers and the associated determinative steps, which would change the principle operations of *Huang* if not render it meaningless. Therefore, the suggested combination of *Huang* and *Hess* is improper and the rejection of claims 2-3, 8-10, and 15-16 should be withdrawn.

Failure to Satisfy Every Claim Limitation

1. Dependent Claims 2-3, 8-10, and 15-16

Claims 2-3, 8-10, and 15-16 stand rejected under 35 U.S.C. 103(a) as being unpatentable over *Huang* in view of *Hess*.

Each of the dependent claims 2-3, 8-10, and 15-16 inherits the limitations of the claims from which they depend. As shown above, *Huang* does not satisfy every limitation of the independent claims. *Hess* is not relied upon to satisfy the missing limitations, nor does it do so. As such, these dependent claims are patentable at least by virtue of the reasons set forth above with respect to their respective independent claims. Therefore, Applicant

requests withdrawal of the rejection of record. Moreover, dependent claims 2-3, 8-10, and 15-16 set forth limitations making them patentable in their own right.

For example, claim 3 recites "selecting carriers closer to or at the center of the band when the subscriber is far away from the base station; and selecting carriers further away from the center of the band when the subscriber is close to the base station." The Examiner admits that *Huang* does not disclose this limitation and relies upon *Hess* as teaching this limitation. *See* Current Action, pg. 10. However, the Examiner's reliance is misplaced because *Hess* fails to make such disclosure, but rather *Hess*' assignment of channels is based upon the received signal strength values measured at the base site receiver, wherein the users having the relatively highest received signal strength values are assigned channels along the outer-most edges of the frequency band. *Hess*, Figure 8, col. 3, lines 58-65, and col. 9, lines 33-49. *Hess* does not disclose whether the measured relative strength values actually correlate to the distance of the user. Accordingly, *Hess* does not disclose selecting carriers based on the location of the subscriber with respect to the base station, as required by claim 3. As shown, the Examiner's proposed combination fails to teach or suggest every claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 8 recites "assigning a spectral priority code to the subscriber based on whether the subscriber is near to or far from the base station, and wherein carrier allocation occurs based on the spectral priority code." In the Current Action, the Examiner admits that *Huang* does not disclose this limitation and relies upon *Hess* as disclosing this limitation. However, *Hess* describes giving priority to the calls in the hand-off queue ahead of the calls in the first assignment queue for efficient loading and minimized interference to active calls. *Hess*, col. 9, lines 3-18. There is no discussion in *Hess* regarding a subscriber's location with respect to the base station or a spectral priority code based on such location (*e.g.*, the priority of a subscriber over other subscribers in being assigned a carrier in a coverage area, based on the path loss or time delay of that subscriber as compared to the other subscribers). As shown, the Examiner's proposed combination fails to teach or suggest every claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 15 recites "the carrier allocator reallocates carriers closer to the center of the band when a subscriber moves farther away from the base station," and claim 16 recites "the

carrier allocator reallocates carriers farther from the center of the band when a subscriber moves closer to the base station." In *Hess*, the channels are assigned first to candidates in the hand-off queue then ones in the first assignment queue, then back to the handoff queue and so on. There is simply no dynamic reallocation of carriers to subscribers as the subscribers move further or closer to the base station. As shown, the Examiner's proposed combination fails to teach or suggest every claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

2. Dependent Claim 29

Claim 29 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over *Huang* in view of well-known prior art.

In the rejection of claim 29, the Office Action states that Official Notice has been taken. See Current Action, pgs. 12-13. Under Rule 37 C.F.R. § 1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. § 2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Otherwise the rejection of claim 29 should be withdrawn.

IV. Conclusion

Applicant believes a fee in the amount of $245.00 is due with this response for the Two (2) Month Extension of Time is being paid concurrently herewith by credit card. However, please charge any additional fees required or credit any overpayment to Deposit Account No. 06-2380, under Order No. 68144/P020US.B/10505125 during the pendency of this Application pursuant to

37 CFR 1.16 through 1.21 inclusive, and any other sections in Title 37 of the Code of Federal Regulations that may regulate fees.

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Respectfully submitted,

By /Robert L. Greeson/
Robert L. Greeson
Registration No.: 52,966
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784
(214) 855-7430
(214) 855-8200 (Fax)
Attorney for Applicant

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By: /Linda L. Gibson/
Linda L. Gibson

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